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IN THE

Supreme Court of the United States

GRANT BAKER, ET AL.,
Conditional Cross-Petitioners,

v.

EXXON MOBIL CORP. AND EXXON SHIPPING CO.,
Conditional Cross-Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONERS

James vanR. Springer
DICKSTEIN SHAPIRO LLP
1825 Eye Street, N.W.
Washington, DC 20006-5403

Brian B. O'Neill
FAEGRE & BENSON
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901

David W. Oesting
Counsel of Record
Stephen M. Rummage
David C. Tarshes
Jeffrey L. Fisher
DAVIS WRIGHT TREMAINE LLP
Suite 800
701 W. Eighth Avenue
Anchorage, AK 99501-3468
(907) 257-5300

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REPLY BRIEF FOR CONDITIONAL CROSS-PETITIONERS

Plaintiffs' conditional cross-petition raises a single issue: whether, if this Court chooses to review the punitive award in this case, it should be free to decide that the Ninth Circuit erred in reducing the award from $5 billion to $2.5 billion.[1] The cross-petition frames the factual background pertinent to that question almost exclusively by quoting from and citing to the findings and analyses of the courts below. In contrast, Exxon's response makes clear that *its* arguments with respect to the punitive award in this case are entirely fact-bound and would require this Court to sift through the nearly 8,000 pages of transcript, hundreds of exhibits, and numerous post-trial filings to ascertain whether Exxon's cherry-picked citations and attacks on the courts' findings below are accurate.

Exxon acknowledges that one of its tankers spilled oil into Prince William Sound. But beyond that, Exxon disputes virtually every detail of this eighteen-year litigation. Exxon asserts that Captain Hazelwood was not drunk when the EXXON VALDEZ ran aground on Bligh Reef; that even if he were drunk, his drinking did not have anything to do with the grounding; that even if Hazelwood's drinking did cause the grounding, he was not an alcoholic; that even if Hazelwood were an alcoholic, he hid his excessive drinking from Exxon executives; that even if Exxon executives knew that Hazelwood drank excessively, federal law prevented Exxon from firing him, assigning him to a shoreside position, or even monitoring him; and that even if Exxon had the ability to take preventative measures concerning Hazelwood, Exxon

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[1] Plaintiffs will not respond to Exxon's *ad hominem* speculation as to their reasons for filing the cross-petition except to note that the statement of the case in plaintiffs' cross-petition adds virtually nothing to the statement in their brief in opposition. The argument section of the cross-petition is two pages. Exxon's response is 25 pages.

executives did closely monitor him. With respect to the oil spill itself, Exxon suggests that it cleaned up the spill right away; that it paid all claimants for their economic injuries voluntarily, fairly, and promptly; and that the plaintiffs did not suffer any harm besides loss of income. Finally, Exxon contends that the spill was actually a net plus for plaintiffs and the State of Alaska, triggering an economic "boom" in the Prince William Sound region. Exxon's BIO at 7-8.

We have been through all of this several times already. First, the parties had a trial – an 83-day, multi-phase trial, culminating in the jury's being instructed that it should base any punitive award against Exxon on the degree to which Exxon's corporate conduct was reprehensible and on the extent of the plaintiffs' injuries. *See* Pltfs' BIO App. 11a-18a (jury instructions). Second, the parties briefed the constitutionality of the size of the punitive award to the district judge who presided over the trial, in the context of Exxon's post-trial motion for judgment as a matter of law or remittitur. Third, the parties presented the facts on appeal to the Ninth Circuit in comprehensive filings that the court allowed to be tens of thousands of words overlength. Fourth, the parties briefed the constitutionality of the size of the punitive award on remand to the district court, so as to allow reconsideration in light of this Court's intervening *BMW* and *Cooper* decisions. Fifth, the parties again briefed that issue to the district court, so as to allow reconsideration in light of *State Farm*. Sixth, the parties briefed the constitutionality of the size of the award again to the Ninth Circuit.

During every one of these proceedings, the parties presented and exhaustively briefed the same factual disputes Exxon now raises, and Exxon relied on the same portions of the record it now cites to mount the same attacks on plaintiffs' evidence it now presses:

- As to Hazelwood's drunkenness when the supertanker ran aground, *compare* Exxon's 1997 C.A. Br. at 14-15 *with* Pltfs' 1997 C.A. Br. at 11-12, 24-25;

- As to the connection between Hazelwood's drunkenness and the grounding, *compare* Exxon's 1997 C.A. Br. at 7, 10-14, 58-62 *with* Pltfs' 1997 C.A. Br. at 14-23;

- As to Hazelwood's alcoholism, *compare* Exxon's 1997 C.A. Br. at 15-16 *with* Pltfs' 1997 C.A. Br. at 27-29;

- As to Exxon's awareness that Hazelwood had relapsed and was drinking aboard ships, *compare* Exxon's 1997 C.A. Br. at 19-20, 64 & 2004 C.A. Br. at 33-34 *with* Pltfs' 1997 C.A. Br. at 25-41 & 2004 C.A. Br. at 21-22;

- As to Exxon's ability to fire Hazelwood or assign him to a shoreside position, *compare* Exxon's 1997 C.A. Br. at 16-18, 20-21, 63-65 & 2004 C.A. Br. at 34-35 *with* Pltfs' 1997 C.A. Br. at 31 n.20, 113-16, 144-45;

- As to Exxon's claim that it monitored Hazelwood, *compare* Exxon's 1997 C.A. Br. at 18-20, 65-68 *with* Pltfs' 1997 C.A. Br. at 29-36;

- As to the efficacy of Exxon's cleanup effort, *compare* Exxon's 1997 C.A. Br. at 4-5, 27, 29 & 2004 C.A. Br. at 5, 32, 41, 50 *with* Pltfs' 1997 C.A. Br. at 47-50 & 2004 C.A. Br. at 36;

- As to the nature, speed and fairness of Exxon's claims program, *compare* Exxon's 2004 C.A. Br. at 5, 41-43, 46-47 *with* Pltfs' 2004 C.A. Br. at 36, 47-50; and

- As to plaintiffs' non-economic harm, *compare* Exxon's 2004 C.A. Br. at 37-38 *with* Pltfs' 2004 C.A. Br. at 25-28.

The sole exception is Exxon's "economic boom" argument, which Exxon, not surprisingly, chose not to present to the

jury. This argument rests entirely on affidavits that Exxon submitted eight years after trial, CD 7488, 7489, and Exxon urged it on the district court only during its due process reviews on remand. *Compare* Exxon's 2002 Renewed Mot. for Reduction of Punitive Damages Award at 12-13 *with* Pltfs' Opp. to Mot. at 51-54.[2]

"The precise [punitive] award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). At every stage of these proceedings, the factfinders and reviewing courts have rejected Exxon's version of events. The jury returned a verdict for the plaintiffs. The district judge who presided over this case for a decade repeatedly rejected Exxon's efforts to recast the evidence. *See* Pet. App. 231a-235a, 240a-246a, 254a-257a (1995 orders denying Exxon's motions for judgment and new trial on punitive damages); Pet. App. 183a-186a, 198a-216a (2002 order on Exxon's renewed motion for reduction of punitive damages); Pet. App. 120a-124a, 149a-172a (2004 order on Exxon's second renewed motion for reduction of punitive damages). And the Ninth Circuit, after having the case under submission in two separate appeals for almost four years, rejected Exxon's characterizations of the facts and confirmed that the corporation acted highly reprehensibly in knowingly "[p]lacing a relapsed alcoholic in control of a supertanker."

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[2] All of the parties' Ninth Circuit briefs, with the exception of Exxon's 2004 reply brief, are available online. *See* Pltfs' 2004 C.A. Br., 2004 WL 3960330; Pltfs' 1997 C.A. Br., 1997 U.S. 9th Cir. Briefs LEXIS 119; Exxon's 2004 C.A. Br., 2004 WL 3960031; Exxon's 1997 C.A. Br., U.S. 9th Cir. Briefs LEXIS 3; Exxon's 1997 C.A. Reply Br., 1997 U.S. 9th Cir. Briefs LEXIS 5. Except where noted, the parties' district court briefing did not differ materially.

See Pet. App. 60a-64a, 86a-91a, 95a-101a (first appeal); 22a-40a (second appeal).[3]

This Court does not sit to referee factual squabbles that a jury and two lower courts have analyzed extensively and resolved unanimously. *See, e.g., Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) (describing "two court rule"); *Comstock v. Group of Investors*, 335 U.S. 211, 214 (1948) (same). But if this Court were to accede to Exxon's highly unusual request to revisit the facts in order to evaluate the constitutionality of the size of the punitive award, it should not foreclose itself from concluding that the facts as the district court and the Ninth Circuit found them support a punitive award of more than $2.5 billion.

CONCLUSION

Should this Court grant Exxon's petition for a writ of certiorari, the Court also should grant the conditional cross-petition for a writ of certiorari.

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[3] To provide just one example: After reviewing the trial record in detail, the Ninth Circuit explained that the jury "plainly" found that "Hazelwood took command of the ship so drunk that a non-alcoholic would have passed out," Pet. App. 87a, and that "the jury found that the corporation, not just the employee, was reckless." Pet. App. 83a. Citing a newspaper story disguised as part of the record, however, Exxon says that jurors "told the press they could not determine whether Hazelwood had been impaired by alcohol" and they based their punitive verdict on Hazelwood's recklessness. Exxon's BIO at 13; *see also* Exxon Pet. for Cert. 13 n.5. Exxon knows better; jurors' post-trial statements do not have any legal significance, Fed. R. Evid. 606(b), 802, and, as plaintiffs' prior briefing shows, the record supports the Ninth Circuit's assessment of the evidence. In any event, Exxon neglects to inform this Court that another press report offered a contradictory account of the jury's reasoning inside the jury room. *See* Natalie Phillips, *We Did the Right Thing*, ANCHORAGE DAILY NEWS, Sept. 18, 1994, at A6.

Respectfully submitted,

James vanR. Springer
DICKSTEIN SHAPIRO LLP
1825 Eye Street, N.W.
Washington, DC 20006-5403

Brian B. O'Neill
FAEGRE & BENSON
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901

David W. Oesting
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David C. Tarshes
Jeffrey L. Fisher
DAVIS WRIGHT TREMAINE LLP
Suite 800
701 W. Eighth Avenue
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(907) 257-5300

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